

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GIOVANNI MCDOWELL,

Plaintiff,

v.

STEVE SMITH, et al.,

Defendants.

No. 1:24-cv-00500-SAB (PC)

ORDER DIRECTING CLERK OF COURT TO
RANDOMLY ASSIGN A DISTRICT JUDGE
TO THIS ACTION

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF
RETALIATION CLAIM

(ECF No. 13)

Plaintiff is proceeding pro se and in forma pauperis in this action filed pursuant to 42 U.S.C. § 1983.

Currently before the Court is Plaintiff's first amended complaint, filed July 25, 2024.

I.

SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that "fail[] to state a claim on which relief may be granted," or that "seek[] monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B);

1 see also 28 U.S.C. § 1915A(b).

2 A complaint must contain “a short and plain statement of the claim showing that the pleader
3 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
4 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
5 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
6 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally
7 participated in the deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
8 2002).

9 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
10 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d
11 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be
12 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer that
13 each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S.
14 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted
15 unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s liability”
16 falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

17 II.

18 SUMMARY OF ALLEGATIONS

19 The Court accepts Plaintiff’s allegations in his complaint as true *only* for the purpose of the
20 screening requirement under 28 U.S.C. § 1915.

21 There was an excessive risk of placing Plaintiff (a Black inmate) with White and Hispanic
22 inmates immediately after a racial riot whereas GBI/SBI were directly by-products of the
23 situation. “1) GBI/SRI even if still impending and not yet incurred substantive excessive risk. 2)
24 I informed C/O’s of aforementioned impending harm, yet to no avail.” Also, CDCR substantiated
25 the claims in the internal investigation, proving its validity. CDCR knew the riot was racially
26 motivated and placed Plaintiff with Whites and Hispanics endangering his safety.

27 Warden Steve Smith knew of the danger and personally minimized it saying “this is
28 program yard.” Sergeant Storey and officer Luis Cobian personally moved Plaintiff to said

1 danger and were reasonably aware of the impending harm. Officer Joseph Davis also knew of the
2 impending harm of placing a Black with White and Hispanic inmates especially after a racial riot
3 and knowingly left him in danger and even mocked Plaintiff stating, “you don’t look very Black
4 to me.”

5 Plaintiff alleges retaliation in his grievance to CDCR and his claims were substantiated.
6 Plaintiff has “alleged 1) a state actor(s) took adverse action against me 2) they took action due 3)
7 to my previous ‘602’s’ grievances 4) I was put in harms way (with the White & Hispanics
8 immediately following a racial riot in a botched attempted to get me hurt physically/mentally as
9 to chill my exercise of my 1st Amendment right, and 5) placing me with the wrong races
10 immediately after the transpiration of a race riot served no penological interest.”

11 Plaintiff seeks six hundred thousand dollars.

12 III.

13 DISCUSSION

14 A. Deliberate Indifference to Safety

15 The Eighth Amendment requires that prison officials take reasonable measures to
16 guarantee the safety of prisoners. Farmer v. Brennan, 511 U.S. 825, 832 (1994). In particular,
17 prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Id.
18 at 833; Cortez v. Skol, 776 F. 3d 1046, 1050 (9th Cir. 2015); Hearns v. Terhune, 413 F.3d 1036,
19 1040 (9th Cir. 2005); Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982); Gillespie v.
20 Civiletti, 629 F.2d 637, 642 & n.3 (9th Cir. 1980). The failure of prison officials to protect
21 inmates from attacks by other inmates or from dangerous conditions at the prison violates the
22 Eighth Amendment when two requirements are met: (1) the deprivation alleged is, objectively,
23 sufficiently serious; and (2) the prison official is, subjectively, deliberately indifferent to inmate
24 health or safety. Farmer, 511 U.S. at 834. A prison official is deliberately indifferent if he knows
25 of and disregards an excessive risk to inmate health or safety by failing to take reasonable steps to
26 abate it. Id. at 837.

27 A prisoner may state a § 1983 claim under the Eighth Amendment against prison officials
28 only where the officials acted with “deliberate indifference” to the threat of serious harm or injury

1 to an inmate by another prisoner, Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986); see also
 2 Valandingham v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989) (deliberately spreading rumor
 3 that prisoner is snitch may state claim for violation of right to be protected from violence while in
 4 state custody), or by physical conditions at the prison. The official must both be aware of facts
 5 from which the inference could be drawn that a substantial risk of serious harm exists, and he
 6 must also draw the inference. See Farmer, 511 U.S. at 837.

7 “[S]peculative and generalized fears of harm at the hands of other prisoners do not rise to
 8 a sufficiently substantial risk of serious harm.” Williams v. Wood, 223 F. App’x 670, 671 (9th
 9 Cir. 2007); Dixon v. Lavin, 234 F. App’x 814 (9th Cir. 2007). At the same time, however, “a
 10 prison official [may not] escape liability for deliberate indifference by showing that, while he was
 11 aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was
 12 especially likely to be assaulted by the specific prisoner who eventually committed the assault.”
 13 Farmer, 511 U.S. at 843.

14 Here, based on Plaintiff’s allegations in the first amended complaint, Plaintiff states a
 15 cognizable claim for deliberate indifference to his safety against Defendants Smith, Storey, Davis,
 16 and Cobian.

17 **B. Retaliation**

18 “Prisoners have a First Amendment right to file grievances against prison officials and to
 19 be free from retaliation for doing so.” Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012)
 20 (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). “Within the prison context, a
 21 viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a
 22 state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected
 23 conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and
 24 (5) the action did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson,
 25 408 F.3d 559, 567-68 (9th Cir. 2005). To state a cognizable retaliation claim, Plaintiff must
 26 establish a nexus between the retaliatory act and the protected activity. Grenning v. Klemme, 34
 27 F.Supp.3d 1144, 1153 (E.D. Wash. 2014). Mere verbal harassment or abuse does not violate the
 28 Constitution and, thus, does not give rise to a claim for relief under 42 U.S.C. § 1983.

1 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). In addition, threats do not rise to the
2 level of a constitutional violation. Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987).

3 Here, Plaintiff simply speculates that he believes Defendants' actions may have been the
4 result of retaliation for having filed a prior civil rights action against another prison officials.
5 However, mere speculation of retaliatory motive is not sufficient to give rise to a claim for relief.
6 Wood v. Yordy, 753 F.3d 899, 904 (9th Cir. 2014). Retaliation is not established simply by
7 showing adverse activity by these Defendants after protected speech; rather, Plaintiff must show a
8 nexus between the two. See Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000)
9 (retaliation claim cannot rest on the logical fallacy of post hoc, ergo propter hoc, i.e., "after this,
10 therefore because of this"). In addition, Plaintiff does not allege whether Defendants knew about
11 Plaintiff's conduct, i.e., filing of prior grievances. Without non-speculative allegations of
12 Defendants' motivation for their alleged retaliatory actions and knowledge of such protected
13 conduct, no claim for retaliation is stated.

14 **C. Further Leave to Amend**

15 In light of the fact that the Court informed Plaintiff previously of the relevant legal
16 standards governing his claims and he has failed to cure the pleading deficiencies with respect to
17 his retaliation claim, further leave to amend would be futile. Hartmann v. Cal. Dep't of Corr. &
18 Rehab., 707 F.3d 1114, 1130 (9th Cir. 2013) ("A district court may deny leave to amend when
19 amendment would be futile."); Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

20 **IV.**

21 **ORDER AND RECOMMENDATIONS**

22 Based on the foregoing, it is HEREBY ORDERED that the Clerk of Court shall randomly
23 assign a District Judge to this order.

24 Further, it is HEREBY RECOMMENDED that:

- 25 1. This action proceed on Plaintiff's deliberate indifference to safety claim against
26 Defendants Smith, Storey, Davis, and Cobian; and
- 27 2. Plaintiff's retaliation claim be dismissed from the action for failure to state a
28 cognizable claim for relief.

1 These Findings and Recommendations will be submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen**
3 **(14) days** after being served with these Findings and Recommendations, Plaintiff may file written
4 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
5 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
6 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834,
7 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

8
9 IT IS SO ORDERED.

10 Dated: **August 7, 2024**


UNITED STATES MAGISTRATE JUDGE